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Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. _____

STEPHEN J. SCHAP, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

---

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QUESTION PRESENTED

WHETHER THE JURY INSTRUCTIONS APPELLANT'S CASE VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY SHIFTING THE BURDEN OF PROOF ON A CRITICAL ELEMENT OF THE CHARGED OFFENSE OF MURDER.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

STEPHEN J. SCHAP, SERGEANT,
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Stephen J. Schap, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces entered in this proceeding.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Armed Forces, reported at ___M.J.____(CAAF 1998) is reproduced as Appendix A. The Judgment and Mandate of the United States Court of Appeals for the Armed Forces is reproduced as Appendix B. The Opinion of the United States Army Court of Criminal Appeals, United States v. Stephen Schap, reported at 44 M.J. 512 (ACCA 1997) is reproduced as Appendix C.

JURISDICTION

The jurisdiction of this Court is based upon 28 U.S.C. section 1259(3) (Supp. 1992). The decision of the United States Court of Appeals for the Armed Forces, became final on October 26, 1998 when Mandate was issued.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be ...deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

In February, March, and April, 1994, Sergeant (hereinafter SGT) Schap was tried by a general court-martial composed of officer and enlisted members (hereinafter the jury[1]) on a charge of premeditated murder in violation of Uniform Code of Military Justice art. 118, 10 U.S.C. sec.918 (1982) (hereinafter UCMJ) at Hanau, Federal Republic of Germany.

At trial, the evidence was virtually unrefuted that petitioner, upon discovering that a close friend had impregnated his wife, killed the friend, and in the process, decapitated him. Neither the petitioner's identity, his motive, nor the means of death were in issue. The sole issue before the jury was whether petitioner premeditated this offense during the brief period of time after discovering the identity of his wife's paramour, or whether petitioner was acting in the heat of passion unaccompanied by an objectively reasonable cooling off period.

Despite his plea and substantial evidence that petitioner was in a state of rage at the time of the killing[2] , SGT Schap was found guilty of premeditated murder and was sentenced to be reduced to the rank of Private E-1, to forfeit all pay and allowances, to be confined for life and to be discharged with a Dishonorable Discharge. The Convening Authority approved the sentence, reducing the period of confinement to forty-five (45) years.

---

[1] Court-martial members are the functional equivalent of a jury.

[2] Major Carroll Diebold, a Board Certified Psychiatrist who participated in petitioner's "Sanity Board", was called as a defense witness. He testified that the appellant was "in a rage" at the time of the attack, and that it would be "very difficult" for a person in such a state to coolly and calmly reflect upon his actions. R.1064-1065. He testified that these were the opinions of the entire Board. R. 1104.

When the military judge (hereinafter judge) of petitioner's court-martial instructed petitioner's jury on the law:

> 1. He failed to instruct that the prosecution carried the burden of proving, beyond reasonable doubt, that petitioner was **not** acting in the heat of sudden passion caused by adequate provocation before the jury could consider his guilt on the charge of murder;
>
> 2. He erroneously advised the jury at one point that "heat of passion is not in issue in this case" (In truth, heat of passion was the **only** issue in the case);
>
> 3. He advised the jury that petitioner could be found guilty of premeditated murder even if the jury found that, at the time of the killing, petitioner was acting in the heat of passion; and,
>
> 4. He failed to tailor the instructions in any manner to the relevant facts of the case, instead repeatedly advising petitioner's jury that they could "consider all relevant facts and circumstances" when deliberating.

On appeal to the United States Army Court of Criminal Appeals, (hereinafter ACCA) appellant asserted seven separate legal and factual errors which he contended resulted in an unjust verdict and sentence. By Published Opinion that Court denied appellant relief (Appendix C).

The United States Court of Appeals for the Armed Forces (hereinafter CAAF) subsequently affirmed the lower court's decision following a grant of discretionary review (Appendix A).

REASONS FOR GRANTING THE WRIT

I

WHERE PETITIONER'S JURY WAS NOT INSTRUCTED THAT THEY MUST FIRST FIND BEYOND A REASONABLE DOUBT THAT, AT THE TIME OF THE OFFENSE, PETITIONER WAS NOT ACTING IN THE HEAT OF PASSION, BEFORE THEY COULD CONSIDER THE CHARGE OF MURDER, PETITIONER WAS DENIED DUE PROCESS OF LAW.

A military accused who is charged with murder in violation of Article 118, UCMJ and who has raised a "heat of passion" defense should be entitled to a specific instruction that in order to find him guilty of the charge, the jury must first find beyond a reasonable doubt that he did not act in the heat of passion at the time of the killing. No such instruction was provided here.

The failure to instruct the petitioner's jury as to the prosecution's special burden where heat of passion is raised by the evidence constituted a shift in the burden of proof, by placing on equal footing the jury's consideration of both murder and manslaughter. Statutes which shift the burden of proof to an accused to prove an affirmative defense are not always unconstitutional. In Patterson v. New York, 432 U.S. 197 (1977), this Court upheld a state statute that shifted the burden of proof to establish an affirmative defense to an accused because the burden shift did not "serve to negative any facts of the crime which the state (was) to prove in order to convict of murder." 432 U.S. at 207. However, when an affirmative defense **does** negate an element of the crime, the state may not shift the burden. In such a case, In Re Winship, 397 U.S. 358 (1970) requires the state to prove the nonexistence of the defense beyond reasonable doubt.

Although CAAF recognized the authority of Mullaney v. Wilbur, 421 U.S. 684 (1970) in its decision in this case, implicitly recognizing the special burden cited, there currently exists no

requirement that a military jury be so instructed. No such instruction was provided here, resulting in petitioner's conviction of premeditated murder despite substantial evidence that his offense was committed while acting in the heat of passion and was no more than a voluntary manslaughter. While petitioner was adjudged a sentence of confinement for life, a conviction of voluntary manslaughter would have resulted in a ten year maximum sentence of confinement.

An instruction which shifts the burden of persuasion on an element of an offense violates due process. Francis v. Franklin, 471 U.S. 307 (1985). Here, the sole issue before petitioner's jury was the element of intent; either petitioner had intent to kill and premeditated the homicide, or he had intent to kill, but was prevented from premeditating because he was acting in the heat of passion.

The elements of murder under Article 118, UCMJ are:

1. That the victim is dead;
2. That his death resulted from the act of the accused;
3. That the killing was unlawful; and
4. That at the time of the killing, the accused had a premeditated design to kill.

The judge correctly instructed on these elements. See Record of Trial (hereinafter R.) 1208.

The elements of unpremeditated murder under Article 118, UCMJ and of voluntary manslaughter under Article 119, UCMJ are the same, and are:

1. That the victim is dead;
2. That his death resulted from the act of the accused;
3. That the killing was unlawful; and
4. That at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon the victim.

The difference between the two offenses arises when, with the latter, a jury is additionally instructed that the offense of voluntary manslaughter is committed when a person, with the intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation. Such was the additional instruction provided here. R. 1213 found at Appendix D.

The elements of all three offenses are the same except that, with premeditated murder, an accused must be found to have premeditated the homicide; with unpremeditated murder, he need only have the intent to kill or inflict great bodily harm, and with voluntary manslaughter, he must have the intent to kill or inflict great bodily harm, but he must be acting in the heat of passion. This latter state of mind has repeatedly been found to preclude the ability to premeditate. This Court in Mullaney v. Wilbur, 421 U.S. 684, (1975) held that, in order to obtain a murder conviction, the prosecution must "prove beyond a reasonable doubt the **absence** of heat of passion on sudden provocation" when the issue is properly presented in a homicide case. *Id.* at 697-9. Failure to impose this burden on the prosecution results in a denial to the accused of Constitutionally guaranteed due process of law. This is because premeditation and heat of passion are mutually exclusive and cannot coexist simultaneously. This principle has been recognized in the military courts as well. "Premeditation requires that one with a cool mind did, in fact, reflect before killing". United States v. Hoskins, 36 M.J. 343, 346 (CMA 1993).

The defense theory of this homicide was clearly that appellant was acting in a "rage" at the time of the offense, and therefore his capacity to premeditate was substantially impaired.[3] R. 945, 966, 967, 1064, 1065, 1104, 1149. "Rage" is specifically included as a mental state which will reduce Article 118 Murder to Article 119 Manslaughter. Paragraph 44(c)(1), Manual for Courts- Martial, United States, 1984 (hereinafter M.C.M.).

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[3] Drs. Reynolds and Diebold both offered evidence on this issue at R.967 and 1149, respectively. Dr. Diebold, in fact, specifically addressed appellant's state of mind.

When a theory is raised by a defendant, the Court should refer to that theory and to the testimony bearing on it and submit the issue with an instruction on the applicable law. United States v. Jenkins, 701 F.2d 850 (10th Cir. 1983). The jury should be advised of the defendant's position so as to put the issues raised by the theory of defense squarely before it. Beck v. United States, 305 F.2d 595, 599 (10th Cir.), *cert. denied*, 371 U.S. 890 (1962). Notwithstanding the confusing and contradictory instructions noted below, the failure of the judge in this case to require the jury to exclude manslaughter as an *a priori* consideration, before considering premeditated murder, allowed them to consider both offenses simultaneously, and on equal footing. This violated appellant's rights to due process of law at a fundamental level, since the latter precludes the former as a matter of law.

II

THE INSTRUCTIONS IN APPELLANT'S CASE WERE SO CONFUSING, MISLEADING AND INCORRECT THAT THERE EXISTS A PROBABILITY THE JURY RELIED ON AN UNCONSTITUTIONAL UNDERSTANDING OF THE LAW IN REACHING THEIR VERDICT

Further compounding the unconstitutional burden shifting argued above were multiple substantive errors and omissions in the judge's instructions to the jury. The instructions provided petitioner's jury were neither accurate statements of the issues present nor were they tailored, as required by military law, examples of misstatements follow:

1. At one point in his instructions, the judge incorrectly stated that "... the heat of passion defense is not in issue here...". (R. 1215 at Appendix D). The heat of passion defense was the **sole** issue in the case, since a finding on that issue determined appellant's guilt or innocence of the charge of murder. Such an instruction, whether inadvertent or otherwise, could have been construed as removing consideration of manslaughter at all, which clearly would have deprived petitioner of due process of law.

Although the judge elsewhere correctly stated the fact that defendant relied upon heat of passion as a mitigating factor,

merely contradicting an incorrect instruction with another instruction does not satisfy due process. The incorrect portion of the instructions must be considered in the context of the charge as a whole to determine whether or not the challenged language could have been understood by a reasonable juror as shifting the burden of persuasion. Francis v. Franklin, 407 US 307 at 321.

2. Early in his instructions while discussing the requirement that an objectively reasonable period of time to "cool off" was required for the petitioner to avail himself of a manslaughter defense, the judge advised the jury that "... the fact that the accused's passion may have continued at the time of the killing does not necessarily demonstrate that he was deprived of the ability to premeditate...".(R.1209 at Appendix D.) This instruction is patently incorrect and allowed the jury to conclude that the petitioner premeditated **even if he was acting in the heat of passion**. As noted, it is a fundamental principle in the law that heat of passion and premeditation cannot coexist simultaneously. Again, whether inadvertent or otherwise, the erroneous instruction could have been construed as removing from consideration any argument that, notwithstanding the petitioner's mitigated mental state, he was unable to premeditate. Such an instruction surely reduced the government's burden of proof below a constitutionally mandated minimum level, since the practical effect of the instruction was to remove from jury consideration petitioner's assertion that, at worst he committed a mitigated homicide.

3. No instruction was provided which specifically addressed rage and its effect on the accused's inability to premeditate or form specific intent despite substantial evidence to support it. The end result was that the elements of an unpremeditated murder and voluntary manslaughter were the same. United States v. Lofton, 776 F.2d 918 (10th Cir. 1985). See also Paragraphs 43 (b)(2) and 44(b)(l) M.C.M. (1984) which define the identical elements of unpremeditated murder and voluntary manslaughter, respectively.

4. When instructing on burden of proof, the judge advised the jury that "...the guilt of the accused is on the government to establish..." (R. 1215 at Appendix D,) rather than stating that the burden of proving the guilt of the accused is on the government. While this misstatement is not alone significant, it reflects a subtle

inference by the judge that the petitioner was guilty, no matter what the remaining instructions advised.

5. The judge repeatedly referred to a "mental condition" of the petitioner which was never defined and served to confuse the issues of mental responsibility, which was not an issue, partial mental responsibility, which was an issue, and appellant's defense that the homicide was a mitigated manslaughter. Jury instructions may not be judged in artificial isolation, but must be considered within the context of the instructions as a whole and the trial record. Estelle v.McGuire, 502 U.S. 62 (1991).

Where two instructions on a material issue are given, and one is correct but the other incorrect, the latter cannot be simply disregarded; consideration must be given to any prejudicial effect the erroneous instruction may have had on the Court members. United States v. Cauley, 12 M.J. 484 (C.M.A. 1982); United States v. Pelletier, 15 U.S.C.M.A. 654, 36 C.M.R. 152 (C.M.A. 1966).

The prejudicial effect of the judge's admonition to the jury that "heat of passion is not in issue" and his instruction that the jury could find the presence of heat of passion and premeditation simultaneously is extremely high where petitioner's intent was virtually the sole issue for the jury to determine.

6. The judge failed completely to "tailor" the instructions to the evidence as required by the Rules for Courts-Martial and case law. Specifically, the Military Judge's Benchbook, Department of Defense Pamphlet (hereinafter DA Pam) 27-9 and R.C.M. 920, reproduced at Appendices E and F respectively, requires that a judge tailor his instructions to fit the facts of a case. Repeatedly, when the instructions called for reference to a particular assertion or evidence, the judge advised the jury to "consider all relevant facts and circumstances" without further elaboration. R 1218 at Appendix D. The jury, untrained in the law, had no way of knowing what evidence was relevant and what was not. Stated simply, the judge failed to provide "a correct legal framework" for evaluating petitioner's claims. United States v. Martinez, 40 M.J. 426 at 429 (CMA 1994).

While hindsight tempts the conclusion that petitioner's jury disregarded the judge's erroneous instructions and followed the contradictory and correct versions where given, such a conclusion would run afoul of precedents of this Court. In fact, the presumptions previously noted by this Court are that "a jury acts according to law", Strickland v. Washington, 466 U.S. 694 (1984), and that "jurors follow and carefully heed their instructions", Richardson v. Marsh, 481 U.S. 200, 206 (1987); Francis v. Franklin, at 324, n.9. It is "settled law...that when there exists a reasonable probability that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." Francis v. Franklin, *Id.*, at 323, n.8.

The instructions provided petitioner's jury were so significantly erroneous on the critical issue in this case that there can be no confidence that the jury here reached a lawful verdict. Such a result must be rejected as constitutionally infirm.

III

THE ERRONEOUS AND ABSENT INSTRUCTIONS NOTED HERE CONSTITUTE PLAIN ERROR.

Ordinarily, a failure by counsel to object to instructions will constitute waiver. R.C.M. 920 (f). Although counsel for petitioner failed to object to the defective and absent jury instructions, this failure is not fatal to consideration of these errors. Where no objection is lodged to instructions given, any claimed errors or omissions must be of a fundamental nature, such as where the judge had a *sua sponte* duty to instruct, United States v. Taylor, 26 M.J. 127 (C.M.A. 1988), or where the erroneous instructions constitute "plain error". United States v. Olano, 507 U.S. 725 (1997). Error is "plain" if it "seriously affects the **fairness, integrity or public reputation** of the judicial proceedings." United States v. Reynolds, 40 M.J. 198, 207 (C.M.A. 1994), (emphasis added,) citing United States v. Olano, supra. "Plain error requires at least, that there be an error, that it is plain, and that it affects a substantial right of the accused, i.e., that it is prejudicial." United States v. Prevatte, 40 M.J. 396 (C.M.A. 1994).

The prejudicial effect of withdrawing from the jury's consideration petitioner's heat of passion defense has been noted above. The fact that petitioner was convicted of premeditated murder despite substantial evidence that he was acting in a rage at the time demonstrates an unfair result in which little confidence can be placed.

CONCLUSION

Wherefore, petitioner respectfully request that the petition for certiorari be granted, based on the fundamental nature of due process inquiry framed by the petitioner's argument, and the potential impact on military justice.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Before

SULLIVAN, CRAWFORD, GIERKE, and EFFRON
Appellate Military Judges

UNITED STATES, Appellee

v.

Sergeant E5 STEPHAN J. SCHAP, 212-70-9023
United States Army, Appellant

USCA Dkt. No. 96-1058/AR Crim. App. No. 9400529

JUDGMENT

This cause was heard by the Court on appeal from the United States Army Court of Criminal Appeals and was argued by counsel on October 17, 1997. On consideration thereof, it is by the Court, this 30th day of September, 1998,

ORDERED and ADJUDGED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed in accordance with the opinion filed herein this date.

For the Court

/s/
Thomas F. Granahan
Clerk of the Court

UNITED STATES, Appellee

V.

Stephen J. SCHAP, Sergeant
U.S. Army, Appellant

No. 96-1058

Crim. App. No. 9400529

United States Court of Appeals for the Armed Forces

Argued October 17, 1997

Decided September 30, 1998

Counsel

For Appellant: William E. Cassara (argued); Dan R. Hyatt and Major Leslie A. Nepper (on brief); Colonel John T. Phelps II, Lieutenant Colonel Michael L. Walters, Major J. Frank Burnette, and Major Holly S. G. Coffey.

For Appellee: Captain Elizabeth N. Porras (argued); Lieutenant Colonel Eva M. Novak (on brief); Colonel John M. Smith, Lieutenant Colonel Frederic L. Borch III, and Captain Joanne P. Tetreault.

Amicus Curiae Urging Reversal: Ms Erin McAuliffe (law student)(argued); David Schlueter, and Mr. Jeff Rosier and Mr. Kevin Loudon (law students) (on brief) for St. Mary's University School of Law.

Military Judges: Craig S. Schwender and Charles E. Trant.

THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL PUBLICATION.

Opinion of the Court

COX, Chief Judge:

Appellant stands convicted [1] of the premeditated murder (and beheading) of a man who cuckolded him. Art. 118(1), Uniform Code of Military Justice, 10 USC § 918(1). Placing the severed head into an athletic bag, appellant took it to the hospital where his wife had been admitted when it was feared she might be suffering a miscarriage (of a child by the deceased). To the horror of his wife and the hospital personnel, appellant burst into her room, pulled the head out of the bag, deposited it on her bedside tray table, and physically forced her to look at it.

Lurid as the facts are, the granted issues [2] are quite straightforward. Finding no errors which materially prejudiced

---

[1] His approved sentence extends to a dishonorable discharge, confinement for 15 years, total forfeitures, and reduction to the grade of Private E-1. The Court of Criminal Appeals affirmed these results. 44 MJ 512 (1996).

[2] We granted these issues for review:

> I. WHETHER INSTRUCTIONAL ERRORS DEPRIVED APPELLANT OF DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL AND CONSTITUTED, AT THE LEAST, PLAIN ERROR.
>
> II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN REFUSING TO ALLOW THE DEFENSE PSYCHIATRIST TO TESTIFY AS TO THE BASIS FOR HIS OPINION.
>
> III. WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN FINDING THE ADMISSION OF BOOKS RELATING TO KNIVES OFFERED AS EVIDENCE OF "PLANNING ACTIVITY" HARMLESS WHERE THE SOLE ISSUE WAS WHETHER APPELLANT PREMEDITATED THIS HOMICIDE OR RATHER ACTED IN THE HEAT OF SUDDEN PASSION.

This case was argued at the University of Texas School of Law, Austin, Texas, without objection from the parties involved. See 38 MJ 136, 137 n. 1 (CMA 1993).

appellant's substantial rights, we affirm. Art. 59(a), UCMJ, 10 USC § 859(a).

Issue I

The first granted issue pertains to the correctness of portions of the military judge's instructions. Appellant contends that the judge erred in multiple respects. As no trial objections were lodged regarding instructions, appellant concedes that these alleged errors or omissions must have been of a fundamental nature, such as where the judge had a sua sponte duty to instruct, or where they constituted "plain error." E. g, United States v. Olano, 507 U.S. 725 (1993); United States v. Taylor, 26 MJ 127, 129 (CMA 1988); United States v. Fisher, 21 MJ 327 (CMA 1986). In particular, appellant first contends that the judge improperly placed a burden of proof upon him.

The sole charge in this case was premeditated murder. Premeditated murder is the unlawful killing of a human being with the "premeditated design to kill." Art. 118(1). Unpremeditated murder is the unlawful killing of a human being without premeditation, but with the intent "to kill or inflict great bodily harm." Art. 118(2).

At trial, the defense made no attempt to deny appellant's conduct, which indeed was witnessed both at the scene of the crime and at the hospital. He also did not deny the intentionality of his conduct or offer a lack-of-mental responsibility defense. Para. 43b, Part IV, Manual for Courts Martial, United States (1994 ed.); Art. 50a, UCMJ, 10 USC § 850a. Instead, the theory of his defense throughout was that he had only committed voluntary manslaughter. Voluntary manslaughter is the unlawful killing of a human being, with the intent to kill or to inflict great bodily harm, while "in the heat of sudden passion caused by adequate provocation." Art. 119(a), UCMJ, 10 USC § 919(a). Thus, a significant focus of the trial was an inquiry into the nature and history of appellant's relationship with his wife, his discovery of her infidelity, the extent and duration of his efforts to learn the

identity of her paramour, his preparation for the killing and his pursuit of the paramour, and his demeanor before, during, and after the killing.

Unpremeditated murder is a lesser-included offense of premeditated murder, and voluntary manslaughter is a lesser included offense of both premeditated and unpremeditated murder. The only difference between premeditated and unpremeditated murder is that in premeditated murder the Government must prove that, "at the time of the killing, the accused had a premeditated design to kill," while in unpremeditated murder the Government need only prove that, "at the time of the killing, the accused had the intent to kill or inflict great bodily harm." Para. 43b, Part IV, Manual, supra.

The elements the Government must prove for voluntary manslaughter are, somewhat paradoxically, identical to those of unpremeditated murder. Compare para. 44b(1) with para. 43b(2), Part IV, Manual. The difference between the two offenses is if, notwithstanding the accused's intentional state of mind, he kills while "in the heat of sudden passion caused by adequate provocation," what would otherwise be unpremeditated murder is mitigated to voluntary manslaughter. This latter mental state, though part of the statutory definition of the offense, is neither an element that the Government must prove nor an affirmative defense that the defense must prove. Once raised, however, the Government must disprove it beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.").

In the instant case, the military judge instructed the members on reasonable doubt as follows:

> You may find the accused guilty of an offense only if ... [they were] convinced as to guilt by legal and competent evidence beyond reasonable doubt as to each and every element of that offense.

(Emphasis added.)

The judge next listed the elements of premeditated murder, particularly defining the phrase: "premeditated design to kill." Immediately thereafter, the judge began instructing the members about the lesser-included offense of voluntary manslaughter. He stated:

> You're advised that an issue has been raised by the evidence as to whether the accused acted in the heat of sudden passion. "Passion" means a degree of rage, pain, or fear which prevents cool reflection. If sufficient cooling off time passes between the provocation and the time of the killing which would allow a reasonable person to regain self-control and refrain from killing, then the provocation will not reduce murder to the lesser offense of voluntary manslaughter. However, you may consider evidence of the accused's passion in determining whether he possess (sic] sufficient mental capacity to have the premeditated design to kill. An accused cannot be found guilty of premeditated murder if, at the time of the killing, his mind was so confused by anger, rage, or sudden resentment that he could not or did not premeditate.
>
> On the other hand, the fact that the accused's passion may have continued at the time of the killing does not necessarily demonstrate that he was deprived of the ability to premeditate, that he did not -and that he did not premeditate. Thus, if you're convinced beyond reasonable doubt that sufficient cooling off time had passed between the provocation and the time of the killing which would allow a reasonable person to regain his self-control and refrain

> from killing, you must decide whether he in fact had the premeditated design to kill.

(Emphasis added.)

Next, the military judge instructed the members on the offense of unpremeditated murder. Again, immediately thereafter, he continued the instructions on voluntary manslaughter:

> You're advised that the lesser offense of voluntary manslaughter in [sic] included within the crime of unpremeditated murder. Voluntary manslaughter is the unlawful killing of a human being with an intent to kill or inflict great bodily harm, done in the heat of sudden passion caused by adequate provocation. Acts of the accused which might otherwise amount to murder constitute only the lesser offense of voluntary manslaughter, if those acts were done in the heat of sudden passion caused by adequate provocation. Passion means a degree of anger, rage, pain, or fear which prevents cool reflection. The law recognizes that a person may be provoked to such an extent that in the heat of sudden passion, caused by adequate provocation, he strikes a fatal blow before he has had time to control himself. A person who kills because of passion caused by adequate provocation is not guilty of murder. Provocation is adequate if it would cause uncontrollable passion in the mind of a reasonable person. The provocation must not be sought or induced as a [sic] excuse for killing or doing harm.

> If you're not satisfied beyond reasonable doubt that the accused is guilty of murder, but you are satisfied beyond reasonable doubt that the killing, although done in the heat of sudden passion caused by adequate provocation, was done with the intent to kill or inflict great bodily harm, you may still find the accused guilty of voluntary manslaughter.

(Emphasis added.)

The military judge then gave an instruction distinguishing premeditated murder from unpremeditated murder. Thereafter, he listed the elements of voluntary manslaughter and explained applicable terms. Then the judge gave an instruction distinguishing voluntary manslaughter from unpremeditated murder.

Later the judge returned to presumptions and burdens, instructing:

> You're further advised, first, that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt.
>
> Second, if there's reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and he must be acquitted.
>
> Third, if there's reasonable doubt as to the degree of guilt, that doubt must be resolved in favor of the lowest degree of guilt as to which there is no reasonable doubt.
>
> And, lastly, the burden of proof to establish the guilt of the accused beyond reasonable doubt is on the Government. The burden never shifts to the accused to establish innocence, or

> to disprove the facts necessary to establish each element of the offense.

(Emphasis added.)

Thus the instructions unfolded in this manner: First, the judge explained the elements of the two relevant types of murder and their relationship with voluntary manslaughter. That is, he explained that, notwithstanding the Government's proof of the elements of murder, if adequate provocation and passion were present, appellant could not be convicted of murder. Then the judge explained the elements and content of voluntary manslaughter itself. Finally, he explained that, if there was reasonable doubt "as to the degree of guilt," appellant could only be convicted of "the lowest degree of guilt as to which there is no reasonable doubt." (Emphasis added.) In other words, since "heat of sudden passion caused by adequate provocation" bars a conviction of murder, a reasonable doubt as to the degree of guilt due to the presence of heat of passion precludes murder.

Though more elaborate than the penultimate sentence quoted from Mullaney v. Wilbur, supra, these instructions amounted to the same thing. Different language might, of course, be suggested. But the question before us is not whether the instructions can be improved upon, but whether they were so flawed as to now justify reversal, even though no objection was made at the point that improvement could readily have been implemented. United States v. Fisher, supra. We hold that the instructions were not so flawed. Nothing in them gives us pause for concern that the court members believed appellant had any burden whatever. Instead, we are satisfied that it was quite clear to the members that, for the Government to prevail on the murder charge, it had to disprove, beyond reasonable doubt, "heat of sudden passion caused by adequate provocation."

The next aspect of appellant's challenge to the instructions involves a phrase-- "mental condition" --uttered several times by the military judge during instructions, again without contemporaneous objection. Appellant seems to imply that, by

using this phrase, the military judge wrongfully injected into the proceedings the possibility that appellant was suffering from some sort of medically or psychologically cognizable category of disease or abnormality. To compound the matter, in appellant's view, the judge never defined this term for the court members. We consider these assertions meritless in the context.

In isolation, the particular instruction appellant now objects to was as follows:

> Now, the evidence in this case has raised an issue whether the accused had a mental condition and required state of mind with the [sic] respect to the offense of premeditated murder and its lesser included offenses. In determining this issue, you must consider all relevant facts and circumstances.

(Emphasis added.)

Of course the instruction was not given in isolation. It was included within a major segment of instruction about the distinctions in state of mind between premeditated murder and lesser-included offenses, including "voluntary manslaughter, if it was done in the heat of sudden passion caused by adequate provocation without time for cool reflection...."

With obvious reference to our opinions such as Ellis v. Jacob, 26 MJ 90 (CMA 1988), and United States v. Berri, 33 MJ 337 (CMA 1991)(evidence of accused's impaired mental state is relevant to attack mens rea elements), the military judge went on to instruct:

> Now, you're advised an accused because of some underlying mental condition may be mentally incapable of entertaining the premeditated design to kill, or the specific intent to kill, or the specific intent to kill or inflict great bodily harm. You should therefore consider, in connection with all the relevant

> facts and circumstances, evidence tending to show the accused may have been suffering from a mental condition of such consequence and degree as to deprive him of the ability to entertain the premeditated design to kill, or the specific intent to kill, or the specific intent to kill or inflict great bodily harm.

(Emphasis added.)

This latter instruction, of course, was the very embodiment of the theory upon which the entire defense case was predicated-that because of appellant's agitated state of mind as a result of his discovery of his wife's infidelity, he was so reasonably provoked and in such sudden heat of passion that he could not have premeditated murder or that, even if his acts were intentional, they were partially excusable due to his state of mind. [3/] As previously indicated, ascertaining appellant's state of mind on the night of the homicide was essentially the only contested matter on the merits. In that regard, numerous witnesses, both expert and lay, were called by both sides on the very point. Nothing was more germane to this trial than appellant's "mental condition" at the time of the offense.

His post-trial effort to infuse the ordinary phrase "mental condition," in the context used by the military judge, with some exclusive technical connotation of psychosis or other formal diagnostic category, see, e.g., American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994), must fail. In the context in which the instructions were

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3/ As appellant himself argues on brief before this Court:

> There was substantial evidence that, at the time of the offense, appellant's mind was so clouded by confusion, anger and rage that he was incapable of premeditating, and that he lacked a sufficient cooling off period following the discovery of his wife's paramour that he was guilty of no offense greater than a manslaughter.

Final Brief at 27-28.

given, nothing could have been clearer to the court members than that the judge was referring to the veritable mountain of evidence

adduced regarding appellant's state of mind, his mens rea, and his claimed sudden heat of passion. The absence of defense counsel's objection or request for clarification corroborates the lack of confusion. We reject this aspect of appellant's challenge to the instructions.

Similarly, we reject appellant's attack on the judge's explanation of the difference between the affirmative defense of lack of mental responsibility--which the defense did not raise-and an attack on a mens rea element of the prosecution's affirmative case--which most assuredly was raised. See Ellis v. Jacob and United States v. Berri, both supra; see generally W. LaFave and A. Scott, Substantive Criminal Law § 1.8(c) (1986).

Arguing that the military judge threw out the heart of the defense case, appellant lifts from a lengthy passage the following language:

> Lack of mental responsibility--that is, heat of passion defense--is not an issue in this case.

The fuller instruction, although partially repetitive of passages already quoted, was as follows:

> Now, the evidence in this case has raised an issue whether the accused had a mental condition and required state of mind with the [sic] respect to the offense of premeditated murder and its lesser included offenses. In determining this issue, you must consider all relevant facts and circumstances.
>
> Now, one of the elements of this offense -of these offenses is a requirement of premeditation and a specific intent to kill as to the charged offense, and the intent to kill or inflict great bodily [sic] as to the lesser

included offenses, on which you've already been instructed.

Now, you're advised an accused because of some underlying mental condition may be mentally incapable of entertaining the premeditated design to kill, or the specific intent to kill, or the specific intent to kill or inflict great bodily harm. You should therefore consider, in connection with all the relevant facts and circumstances, evidence tending to show the accused may have been suffering from a mental condition of such consequence and degree as to deprive him of the ability to entertain the premeditated design to kill, or the specific intent to kill, or the specific intent to kill or inflict great bodily harm.

The guilt of the accused [sic] is on the Government to establish the guilt of the accused by legal and competent evidence beyond reasonable doubt; unless in light of all the evidence, you're satisfied beyond reasonable doubt that the accused, at the time of the alleged offense, was mentally capable of entertaining the premeditated design to kill, or the specific intent to kill, or the specific intent to kill or inflict great bodily harm, you must find the accused not guilty of those offenses.

Now, this evidence was not offered to demonstrate or refute whether the accused is mentally responsible for his conduct. Lack of mental responsibility-that is, heat of passion defense--is not an issue in this case. What is an issue in this case is whether the Government has proved beyond reasonable doubt that the accused had the ability to entertain the premeditated design to kill, or the specific

> intent to kill, or the specific intent to kill or inflict great bodily harm.
>
> In considering this issue, you may consider the evidence of the accused's mental condition before and after the alleged offense, as well as the evidence as to the accused's mental condition on the date of the alleged offense. The evidence as to the accused's mental condition before and after that date is admitted for the purpose of assisting you to determine the accused's condition on the date of the alleged offense.

(Emphasis added.)

We acknowledge that the suggestion that the "heat of passion defense" was "not an issue," taken out of context, would be erroneous. In context, though, it is quite obvious that the military judge was making the distinction between evidence offered as the affirmative defense of lack of mental responsibility and evidence offered to attack elements of the Government's affirmative case. See LaFave and Scott, supra. Given the extensive instructions elsewhere on heat of passion and voluntary manslaughter, we are certain that the members did not mistake the judge's meaning.

We also find meritless appellant's remaining criticisms of the military judge's instructions. For example, appellant complains that, at one point in the judge's extensive instructions to the members regarding the various types of evidence before them, he mistakenly indicated that a witness identified appellant as the speaker of a statement heard by the witness, when in fact, the witness did not identify the speaker. Civilian defense counsel promptly corrected the military judge, who immediately acknowledged and corrected his mistake to the members. This illustrates the reason why parties must object in a timely fashion at trial or face the burden of overcoming plain error on appeal. The matter was corrected, and the trial moved on.

As it happens, the judge was giving the foregoing instruction to explain to the members that, before considering the

content of statement allegedly heard by the witness--which had indeed been offered for the inference that appellant was the speaker--the members had first to determine whether appellant was in fact the speaker. The judge went on to explain that, unless the members were first satisfied "beyond reasonable doubt" that appellant had made the statement, they were to "'disregard" it completely and "give it no consideration, whatsoever."

Ironically, appellant now seeks to leverage this instruction on evidentiary mechanics into an accusation that the judge was "highlighting" negative evidence about him and not summarizing the evidence in an even-handed manner. This particular instruction fell toward the end of a lengthy portion of the instructions in which the judge was explaining different categories of evidence, such as expert and lay witnesses and their opinions, circumstantial and direct evidence, depositions, stipulations, appellant's good-military-character evidence, as well as the statement potentially made by appellant. Nothing in these instructions appears to be less than even-handed or to highlight negative evidence against appellant.

On the whole, we find the military judge's instructions to be legally correct, fair, evenly balanced, and well-tailored to the evidence presented. We find no instructional errors that rise to the level of plain error.

Issue II

In the second granted issue, appellant challenges the military judge's rulings with respect to one of appellant's expert witnesses. [4/]This witness, a forensic psychiatrist, was a member of the "sanity board" convened to evaluate appellant's

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[4/] Though plainly not within the purview of the granted issue, n. 2, supra, appellant also attacks the judge's ruling regarding a second defense psychiatrist. Though unnecessary to respond, we reject this assertion outright. That witness, a forensic psychiatrist, had been led far afield by both counsel--especially by government counsel (without defense objection)--into a variety of legal definitions and conclusions. Finally when, on redirect examination by defense counsel, the witness ventured again into a legal definition of premeditation, the military judge intervened, in this manner:

"mental condition." RCM 706, Manual, supra. Among many types of information considered by the board members, they personally interviewed appellant for a total of some 15 hours. [5/]

The issue before us concerns the use the defense wished to make of those 15 hours of interview. Specifically, the defense wanted the expert to repeat or publish to the court members much of what appellant told them regarding his state of mind and emotions at the time of the offense. Defense counsel argued that these statements were admissible under Mil.R.Evid. 703 and 705 (basis of opinion). [6/] Moreover, counsel argued that the statements were independently admissible as statements made under the

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redirect examination by defense counsel, the witness ventured again into a legal definition of premeditation, the military judge intervened, in this manner:

> ----I'm sorry, counsel, I'm going to terminate this inquiry. This has gone far afield. We're now having a witness discuss legal principles and I'm very uncomfortable with it. Members of the court, I will instruct you on what the law is; what premeditation means; and you'll follow my instructions. Captain Mulligan, I'm holding the Government responsible, because I think you drew this witness way beyond the purpose of his testimony . . .

Trial defense counsel was permitted to continue the examination of his witness regarding the mental nature of premeditation. Appellant's assertion on brief that,

> in effect, the military judge prevented competent expert testimony on a subject which would have been helpful to the trier of fact, to wit: The appellant's inability to premeditate the crime because of the fact that he was in a rage[,]

is unsupported by the record.

[5/] Under Mil.R.Evid. 302, the evidence considered by the board is privileged and cannot be revealed to the prosecution unless the accused "first introduces into evidence such statements or derivative evidence." Here appellant did introduce such evidence, inter alia, by calling the psychiatrists to testify on his behalf in support of the defense attack on the mens rea elements of murder and on "heat of sudden passion cause by adequate provocation."

[6/] Mil.R.Evid. 703 provides:

medical hearsay exception, Mil.R.Evid. 803(4), as exceptions to the rule against hearsay. [7/]

Trial counsel disputed that the statements to the sanity board were "made for medical diagnosis or treatment," arguing that "[t]hey were made pursuant to a sanity board that was directed by the court, clearly for litigation purposes." Trial counsel also objected to allowing the witness to relay appellant's statements, because it would amount to the defense "smuggl[ing] the accused's version of events in without having him take the witness stand." [Appellant did not testify on the merits.]

Based on argument of counsel alone, the military judge agreed that the medical-hearsay rule did not apply. He reasoned that a person seeking ordinary medical assistance was "quite different from an individual facing charges of this nature, going before a government compelled sanity board, with a very strong motive to tell the board something other than what may be the truth[.]" Regarding the claim that Mil.R.Evid. 703 and 705

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Mil.R.Evid. 705 provides:

> The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the military judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

[7/] Mil.R.Evid. 803(4) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> (4) . . . Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

permitted experts to relate an accused's hearsay, the judge asked defense counsel, "[I]f that analysis were so, why wouldn't an accused in every case go tell a doctor everything about the case, and then just call the doctor in. In that way, he could avoid telling his own story from the witness stand?"

Ultimately, citing Mil.R.Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . . .), the judge ruled that, even if the statements satisfied the medical-hearsay exception, he would "exclude any testimony concerning specific statements made by the accused during the course of the interview with the doctor, as I find that its unfair prejudice substantially outweighs its probative value." In so holding, the military judge was consistent with our opinion in United States v. Stark, 24 MJ 381, 384-85 (CMA 1987)(military judge did not abuse discretion in excluding psychiatrist's videotaped interviews of accused, which "would have clearly given appellant an opportunity to smuggle eight hours of testimony before the court members without subjecting himself to the crucible of cross-examination"), cert. denied, 484 U.S. 1026 (1988); cf. United States v. Neeley, 25 MJ 105 (CMA 1987), cert. denied, 484 U.S. 1011 (1988).

It is important to note the boundaries of the matter here in issue. We are not talking about limiting a party's ability to probe the basis of an opinion offered by a party opponent. See RCM 705; Giannelli, Expert Testimony and the Confrontation Clause, 22 Cap. U. L. Rev. 45 (1993). Nor are we talking about a party's ability generally to develop and support its own experts' opinions. See United States v. Combs, 39 MJ 288, 291-92 (CMA 1994). Instead, we are focusing on what has variously been termed "conduit problems," the "'backdoor' hearsay exception," or simply hearsay smuggling. 3 C. Mueller and L. Kirkpatrick, Federal Evidence 685 (2d ed. 1994); 2 S. Salzburg, M. Martin & D. Capra, Federal Rules of Evidence Manual 1368 (7th ed. 1998). Mil.R.Evid. 403 is a judge's tool for preventing a party from unfairly smuggling hearsay, either as "basis" for an expert's opinion or under the various hearsay exceptions. Of course not all "smuggled" hearsay must be excluded at all times; and certainly instructions can often be crafted to guide factfinders when appropriate. Ultimately, the military judge retains considerable

discretion in deciding when the prejudice is too great to permit admission of the proffered evidence. See United States v. Sullivan, 42 MJ 360, 363 (1995).

Here, appellant's expert was permitted great leeway in explaining not only his conclusions about appellant's mental state, but also about the information he utilized in arriving at those conclusions. Appellant, of course, was free, if he chose, to testify and present his version of the events and his state of mind to the factfinders. Had he done so, the unfairness equation regarding the proffered hearsay evidence would undoubtedly have changed. Under the circumstance, we are satisfied that the military judge did not abuse his discretion. This issue is without merit.

III

In the final issue before us, appellant challenges the military judge's decision to receive in evidence various books or pamphlets found in appellant's quarters. Portions of each item contained information or pictures about knives or knife fighting. One was an Army Field Manual, another a coffee-table picture book about general Army life, still another a mail-order catalog. One booklet and a pamphlet were specifically knife-oriented, denominated respectively: "Everybody's Knife Bible" and "Your Silent Partner." The significance of the materials apparently relates to statements made by appellant at the hospital.

One of the German doctors who rushed to the room described appellant's "logical," "orientated," "clear" statements as follows:

> And the context of what he talked to us was that he felt humiliated and betrayed by his wife. I remember that he told us that he found a list in her car with several names. And he repeated some times, all of this. And then he told us that he had learned how to disconnect a head from a human body, but we didn't understand very clearly where he had learned that. We understood that he told us, "I've learned that," and the fact that the head was

> position [sic] on his neck and did not move at all showed us that that was done, in anatomical terms, in a very adequate way.

Consistent with this description, appellant's wife appellant saying, upon presenting the head to her:

> [D]on't underestimate me, I'm very skilled at what I do. I studied this, I planned this, I calculated this.

Apparently in response to such statements, the authorities looked for evidence corroborating this training or skill of appellant. What they found was the books.

The defense moved in limine to suppress the materials. The military judge found them to be relevant under Mil.R.Evid. 401 and 402 and not unfairly prejudicial under Mil.R.Evid. 403. Trial counsel did not mention the evidence in his closing argument, and the military judge did not mention them during instructions. Thus they were presented to the factfinders simply as relevant evidence; there was no suggestion that mere possession of the materials amounted to misconduct in any respect.

Appellant now complains that the materials "were totally irrelevant" to his "state of mind," since they were "purchased long before" the offense. He contends prejudice was obvious,

> [g]iven the limited scope of the issues before the members, and the fact that the sole issue before them was whether or not appellant planned and premeditated this homicide . . . .

But appellant underestimates the logical significance of the evidence at trial, which bore no such restriction. It must be remembered that appellant pleaded not guilty to the Charge and specification, thereby putting all elements in issue. Among those elements was proof that appellant killed the deceased. However obvious it may have appeared in retrospect that it was he who burst into the hospital room with the severed head, it was far from

established ab initio that it was he also who perpetrated the fatal assault.

To be sure, as appellant himself observes on brief, his trial "defense counsel openly conceded in his opening remarks to the [trial] Court" that "appellant was the perpetrator of this offense." But opening statements are not evidence, much less conclusive evidence. And since it is apparently not easy to cut off a head with a knife, evidence corroborating appellant's expertise in this area seems highly probative of identity at least.

Moreover, just as appellant's gruesome statements at the hospital were undeniably relevant to prove premeditation and intent, so evidence tending to confirm a knowledge of knife weaponry seems equally relevant. Cf. United States v. Orsburn, 31 MJ 182 (CMA 1990), cert. denied, 498 U.S. 1120 (1991); United States v. Mann, 26 MJ 1 (CMA), cert. denied, 488 U.S. 824 (1988). Indeed, some of the books are roughly analogous to bomb-making manuals found in the residence of a suspected terrorist. Other portions of the materials, to be sure, were only marginally probative at best. Into this latter group fell the coffee-table book and the mail-order catalog. But by the same token, these materials had no prejudicial potential. Art. 59(a). On the whole, we conclude that the military judge did not abuse his discretion in receiving the evidence.

The decision of the United States Army Court of Criminal Appeals is affirmed.

Judges SULLIVAN, CRAWFORD, GIERKE, and EFFRON concur.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee
v.

SEPHEN J. SCHAP, 212-70-9023,
Appellant

USCA Dkt. No. 96-1058/AR
Crim. App. No. 9400529

JUDGMENT
MANDATE
Pursuant to Court Rule 43A
Issued: 10/26/98
By: /s/ E. Brown

This cause was heard by the Court on appeal from the United States Army Court of Criminal Appeals and was argued by counsel on October 17, 1997. On consideration thereof, it is by the Court, this 30th day of September, 1998.

ORDER and ADJUDGED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed in accordance with the opinion filed herein this date.

For the Court

/s/
Thomas F. Granahan

CERTIFIED TO BE A TRUE COPY
OF THE JUDGEMENT

/s/_____
Thomas F. Granahan
Clerk

Date: 26 OCT 1998

APPENDIX C

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
GRAVELLE, JOHNSTON, and ECKER
Appellate Military Judges

UNITED STATES, Appellee
V.
Sergeant STEPHEN J. SCHAP, 212-70-9023
United States Army, Appellant

ARMY 9400529
V Corps
C. S. Schwender and C. E. Trant, Military Judges

For Appellant: Dan R. Hyatt, Esq. (argued); Major Michael A. Egan, JA (on brief); Major J. Frank Burnette, JA.
For Appellee: Major Anthony P. Nicastro, JA (argued); Colonel John M. Smith, JA; Lieutenant Colonel Eva M. Novak, JA (on brief).

29 March 1996

OPINION OF THE COURT

JOHNSTON, Judge:

Contrary to his plea, the appellant was found guilty by a general court-martial composed of officer and enlisted members of premeditated murder in violation of Article 118, Uniform Code of Military Justice, 10 U. S. C. § 918 (1988) [hereinafter UCMJ]. Although the appellant was sentenced by the members to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to Private El, they recommended that the confinement be reduced as a matter of clemency. The convening authority approved only so much of the sentence as provided for a dishonorable discharge, confinement for forty-five years, forfeiture of all pay and allowances and reduction to Private E1.

The appellant contends, inter alia, that the evidence is legally and factually insufficient to support a conviction for any offense greater than voluntary manslaughter, that the military judge made numerous errors in regard to instructions to the members, and that the military judge abused his discretion in improperly limiting the testimony of a defense expert and in admitting evidence that was unduly prejudicial. We disagree and affirm.

Facts

This case involves a sordid tale of infidelity and murder by decapitation.

The appellant and his wife were married in 1989 after a six-month courtship. The appellant took his marriage seriously and wanted it to be a permanent commitment. Because his wife had suffered through three miscarriages during the marriage, the appellant obtained a vasectomy to preclude further suffering on her part.

By December 1991, the wife felt that her feelings for her husband "had pretty much died" and she decided that she could not continue with the marriage. Nevertheless, in December, 1992, she followed her husband to Fulda, Germany, where he was assigned after joining the Army in January, 1992. During 1993, she took advantage of the assignment to Germany and often traveled throughout Europe without him.

The appellant and the victim, Specialist (SPC) Glover, became friends in early 1993. On two or three occasions, SPC Glover visited the appellant and his wife in their quarters. In the summer of 1993, the appellant was required to attend a military leadership training course. While the appellant was away from home, SPC Glover went to the appellant's quarters at least six times and had sexual intercourse with the appellant's wife. The appellant wrote love letters to his wife while attending the course. Although by her own account she no longer loved the appellant at the time and she was having an affair with SPC Glover, she responded with equally passionate correspondence.

By October, 1993, the appellant's wife learned that she was pregnant as a result of her sexual liaisons with SPC Glover. She did not tell the appellant about the pregnancy. She and her husband stopped having sexual relations that same month. In mid-November, 1993, she told the appellant that she no longer loved him and wanted a divorce. Over the Thanksgiving weekend, the couple talked about the details of a separation and divorce. Ultimately they agreed to a separation and her early return to the United States.

Although the appellant's wife assured him that there was no other man in her life, the appellant was suspicious. He intercepted a letter to her postmarked 29 November 1993, that suggested that she was pregnant. On 5 December 1993, the appellant found his wife's secret diary that indicated she may have had many other lovers during their marriage. When the appellant confronted her, she tried to explain the journal entries as fantasies or innocent relationships. On 6 December 1993, they met with a chaplain as a prelude to the pending separation, and both claimed to have been faithful during the marriage.

On 7 December 1993, the appellant went to work as normal while his wife intended to go to the bank. On the way, she experienced very heavy vaginal bleeding. Because she was afraid she was having another miscarriage, she asked an acquaintance to take her to the local German hospital. After she arrived at the hospital, she was told she would be there for at least a week. She attempted to contact SPC Glover through a legal clerk at the legal assistance office where she had worked as a volunteer. Later in the morning, when the appellant coincidentally stopped by the legal assistance office to obtain some papers in connection with the pending marital separation, that same legal clerk told the appellant that his wife was in the hospital. The appellant was concerned and went to the hospital at approximately 1420 while dressed in his battle dress uniform.

When the appellant arrived at the hospital, his wife informed him that she was pregnant because of an extramarital affair with a person she did not identify. He remained calm and

appeared to be concerned about her condition. The appellant left the hospital around 1500 and returned to his quarters to retrieve items his wife had requested for her stay at the hospital. When he had not returned by 1530, she called the quarters twice, but received no answer.

The appellant arrived back at the hospital at approximately 1610 wearing jeans and a jeans jacket. He appeared agitated and questioned his wife about the identity of her lover and the circumstances of the relationship. She told him that the child was conceived while she made love on a quilt in the appellant's living room. The appellant and his wife agreed that the lover should come to the hospital where she was undergoing treatment for the possible miscarriage. She also informed him that she had made arrangements for a message to be delivered to her lover so he could come to her side. While the appellant was in the room with her, she called the legal clerk to see if the message had been delivered. Although the appellant did not learn of SPC Glover's identity at that time, he learned that the lover held the rank of specialist.

Approximately ten minutes later, the appellant called the legal clerk and asked, "did you deliver the message to the specialist?" The legal clerk said he was going to do so, but did not reveal the identity of the intended recipient. He then asked the appellant if he knew where a particular barracks was located.

The appellant immediately drove to the location of the barracks, approached the staff duty noncommissioned officer (NCO), and explained that he needed to find the legal clerk who was looking for a room and that he also needed to find that same room. When the staff duty NCO asked the appellant which soldier he was looking for, the appellant said, "forget it" and departed. At approximately the same time, the legal clerk found the correct room and placed a message under SPC Glover's door. He also had SPC Glover paged to ensure that he was notified that the appellant's wife wanted him to join her at the hospital.

The appellant, who by this time was aware that SPC Glover was the paramour, began looking for him. At some point the appellant had obtained a fighting knife with an eight-inch double-edged blade that he brought with him in his car. The appellant, acting normal, asked a soldier near the barracks dining facility if he had seen SPC Glover. The soldier informed the appellant that SPC Glover was in the telephone booth adjacent to the dining facility. The appellant replied, "[w]ell, I guess he got the message."

Specialist Glover had answered the page and had spoken with the legal clerk. He also had retrieved the message from under his door. At approximately 1715 he called the appellant's wife at the hospital. While SPC Glover was talking on the telephone with the appellant's wife, the appellant approached the telephone booth. Without confronting SPC Glover or giving him any chance to explain what had happened, the appellant stabbed and slashed his intended victim in the back of the neck. Specialist Glover attempted to flee but slipped to the ground. The appellant pursued, ran past his fallen victim, turned and knelt over him and stabbed and cut him ten to twenty times in the throat, practically severing his head. A witness described some of the motions involved in the attack as if the appellant was "cutting meat or skinning a deer." Another witness described it as "slow" and "rhythmic ... .. sort of like a sawing motion."

After stabbing the victim, the appellant stood up and kicked SPC Glover in the head several times. The head separated from the body and rolled several feet away. The onlookers were stunned at the severity of the attack and sickened with the results. One soldier, who observed the attack, vomited at the sight. The appellant, on the other hand, walked over to the head, picked it up by the hair, held it aloft and announced in a loud clear voice, "[t]his is what happens when you commit adultery." He also stated in a sarcastic tone, "[a]nd he said he was sorry." The appellant then turned and walked at a brisk pace to his car, carrying the head under his arm "like a football."

A short time later the appellant was observed near his car that was stopped on a bridge over a stream. When another car

approached, he quickly departed from the area. The appellant continued on his way and parked several hundred yards from the hospital.[11] He removed his blood-stained jacket and shirt, put on an olive-colored jacket, and entered the hospital while carrying an athletic bag. He entered his wife's small hospital room and removed SPC Glover's head from the athletic bag. He appeared agitated and very upset. He held the head in both hands and thrust it toward his wife's face and chest. She screamed and cowered while the appellant set the head facing his wife on an adjacent night stand. He sat down on the bed and said, "Glover's here, he'll sleep with you every night now, only you won't sleep, because all you'll see is this."

As startled medical personnel rushed to the room, the appellant remained seated on the bed, with his legs extended over his wife's legs, his hand on her chest trying to make her look at the head. He said to the German doctors "[g]ood, you stay here, and listen to everything that I have to say, remember as much as you can." He also stated, "I'm her husband, and she's an adulteress, not just with that man, ... but many times over." His wife described his statements as follows:

> He turned to me, he said, "you know," he said, "you gave me enough clues. It was easy enough to figure out who it was. It was easy enough to do this." And he told the doctors, "I'm not normally a violent man. This is my only violent act, but don't underestimate me, I'm very skilled at what I do. I studied this, I planned this, I calculated this." And he turned to me and he said, "I did this for you, because I love you."

When she asked him what he did with the body and the knife the appellant replied:

> I'm not that stupid.... I don't care if they put me in jail for the rest of my life, because I'll just

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[11] While the knife scabbard was recovered from the appellant's car, the knife used to kill the victim was never found.

> think about you. And I don't care if they put me to sleep, if they kill me, because I'll just think about you while they do it.

One of the German doctors testified that the appellant "behaved in a calm way" in the midst of the extraordinary situation at the hospital. The appellant asked for a bucket of water to wash his hands. He told the doctor that he "felt mistreated, humiliated, cheated on." He took off his identification tags and threw them at the German police who arrived on the scene and said, "[t]here's my name, I'm Stephen Schap." He also said they should stay and listen to everything he had to say and be witnesses, but he'd go peacefully only when the military police arrived. Ultimately, the German police on the scene dragged the appellant from the room.

Shortly after he was apprehended, the appellant stated that his wife "shouldn't have done what she'd done," and that he "shouldn't have done what he'd done either," but he "realized what he did" and he would just have to "pay for it." He was described by one witness as being "mighty calm about it." The witness testified that the appellant "didn't appear upset at all."

The appellant's car was located several hundred yards from the hospital. The gas tank was full. Inside, authorities found a change of clothing, food, shaving items, closed-out bank account records, appellant's passport, small amounts of six types of foreign currency, telephone records, diplomas, and tax records. Although prior to the incident, the appellant had received permission to travel to the Netherlands for the weekend of 11 - 13 December 1993, some of the items found in the car normally were stored in boxes at the appellant's quarters.

At his court-martial the appellant, who did not testify on the merits, never contested the fact that he had brutally attacked SPC Glover and taken the severed head to the hospital. His entire defense was that he acted in the sudden heat of passion in committing the crime of voluntary manslaughter.

Assigned Errors

The appellant contends, inter alia, that the evidence at trial was legally and factually insufficient to sustain any offense other than voluntary manslaughter.[2\] Although the law recognizes that a "person may be provoked to such an extent" that "a fatal blow may be struck before self-control has returned," there are very specific requirements for a finding of voluntary manslaughter. *See* Manual for Courts-Martial (1995 Edition) [hereinafter MCM], Part IV, para. 44c(l)(a); *see also United States v. Maxie,* 9 U.S.C.M.A. 156, 25 C.M.R. 418 (1958); *United States v. Edwards,* 4 U.S.C.M.A. 299, 15 C.M.R. 299 (1954); *United States v. Saulsberry,* 43 M.J. 649 (Army Ct. Crim. App. 1995); *United States v. Morgan,* 33 M.J. 1055 (A.C.M.R. 1991), *aff'd* 37 M.J. 407 (C.M.A. 1993); *United States v. Seeloff,* 15 M.J. 978 (A.C.M.R. 1983).

In order for an unlawful killing to be reduced from murder to voluntary manslaughter the homicide must be committed in the "heat of sudden passion" which is "caused by adequate provocation." MCM Part IV, para. 44c(l)(a). For the provocation to be "adequate," however, the provocation must be of a nature to "excite uncontrollable passion in a reasonable person, and the act of killing must be committed under and because of the passion." *Id.* Although the "passion may result from fear or rage," the provocation can not, be "sought or induced" by the killer. *Id.* Furthermore, "[i]f, judged by the standard of a reasonable person, sufficient cooling time elapses between the provocation and the killing, the offense is murder, even if the accused's passion persists." *Id.*

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979); *accord United States v. Turner,* 25 M.J. 324

[2\] ASSIGNMENT OF ERROR I (AE). THE EVIDENCE SUPPORTS A VERDICT OF GUILTY TO NO OFFENSE GREATER THAN VOLUNTARY MANSLAUGHTER.

(C.M.A. 1987). We are satisfied that the evidence of record more than meets this standard as to premeditated murder.

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. In applying this test, we make the following findings.

First, we find that upon his wife's verification of his suspicions that she was unfaithful, the appellant set about to identify and track down the paramour. This was to be accomplished through his questioning of his wife, his contact with the legal clerk who was to deliver the message to the paramour, and his questions to the staff duty NCO.

Next, and most importantly, we find that the appellant intended to murder his wife's paramour, regardless of who it was. He planned to accomplish this objective by using the large fighting knife he brought along for that very purpose. We reject the suggestion that the appellant only intended to confront the paramour and brought along the knife in case matters became unmanageable.

We also find that the nature and severity of the attack, coupled with the appellant's vigorously kicking SPC Glover's head, led to the head being severed from the body. Once the head was severed the appellant picked it up and made his coldly calculated comment about the deadly price of adultery.

We further find that the appellant carefully prepared for his escape and intended to flee from the scene of the crime. Once he held the severed head aloft, however, he realized that his identity would become known. Consequently, he determined to inflict the maximum emotional suffering upon his wife before he was apprehended. All of his conduct prior to the attack, along with his comments at the scene, at the hospital to his wife and the doctors, and to the police, convinces us that the murder was a premeditated act rather than a crime committed in the heat of passion.

In order to prevail on his contention that his crime was voluntary manslaughter, we would have to be persuaded that the evidence presented by the government was insufficient to prove premeditated murder or unpremeditated murder. We find, however, that the murder was consummated in a cold and calculating manner. We further find that the appellant had not lost self-control at the time he killed SPC Glover. We specifically reject the defense contention that the learning of the paramour's identity triggered an uncontrollable rage. The evidence shows that the intent to kill was present before the identity of the paramour was known.

We also specifically find the appellant did not kill SPC Glover while under the influence of uncontrolled passion and because of that passion. Our conclusion is that once the appellant learned of the lover's identity, he specifically intended to kill SPC Glover, that he contemplated and planned SPC Glover's murder, and that he had adequate "cooling off' time to reflect upon the consequences before he acted.

We have carefully evaluated the entire record of trial, and conclude, applying our fact-finding powers of Article 66, UCMJ, that the appellant methodically planned the murder. In short, this was a premeditated murder in violation of Article 118(1), UCMJ, rather than voluntary manslaughter under Article 119, UCMJ.

The appellant has assigned three errors in regard to instructions or lack thereof from the military judge.[3] In this case

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[3] AE II. THE FAILURE OF THE MILITARY JUDGE TO INSTRUCT THE MEMBERS AS TO THE GOVERNMENT'S BURDEN OF PROOF ON HEAT OF PASSION DENIED APPELLANT DUE PROCESS OF LAW.

AE III. THE MILITARY JUDGE COMMITTED PLAIN ERROR IN HIS INSTRUCTIONS TO THE MEMBERS OF APPELLANT'S COURT MARTIAL.

AE IV. THE MILITARY JUDGE COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE MEMBERS SUA SPONTE ON ISSUES WHICH WERE RAISED BY THE EVIDENCE, AND BY FAILING TO TAILOR HIS INSTRUCTIONS.

the military judge gave the standard instructions for premeditated murder, unpremeditated murder, and voluntary manslaughter. *See* Dep't of the Army, Pam. 27-9, Military Judges' Benchbook, para 3-86; 3-87. At various points in the instructions he correctly discussed heat of passion. At no time did the defense object to or request additional instructions. The trial defense counsel's failure to object to an instruction or omission of an instruction constitutes waiver of the objection in the absence of plain error. Rule for Courts-Martial 920(f). *See United States v. Morgan,* 37 M.J. 407 (C.M.A. 1993); *see also United States v. Olano,* 507 U.S. 725 (1993). We are satisfied that the instructional errors, if any, did not rise to the level of plain error. The instructions, when taken as a whole, were appropriate and complete. We hold that the assignments of error concerning the military judge's instructions or lack of instructions are without merit.

The appellant next contends that the military judge abused his discretion in limiting the testimony of the defense expert about rage and premeditation.[4] The military judge permitted the defense expert to testify over government objection. The expert's testimony was directed at states of mind in general. The military judge permitted the witness to testify about how long an individual could remain in a state of rage. He also correctly allowed the expert to discuss a person's ability to reflect on their actions. The military judge properly limited the expert discussion to prevent confusion between the concept of reflection and the legal standard of premeditation. Thus, the assigned error is without merit.

The appellant also contends that the military judge abused his discretion in refusing to allow the defense psychiatrist to testify that at the time of the offense the appellant was in a rage. [5]

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[4] AE V. THE MILITARY JUDGE ABUSED I-US DISCRETION IN PROHIBITING THE DEFENSE EXPERT, DR. REYNOLDS FROM TESTIFYING AS TO THE RELATIONSHIP BETWEEN A STATE OF RAGE AND THE ABILITY TO PREMEDITATE.

[5] AE VI. THE MILITARY JUDGE ABUSED HIS DISCRETION IN REFUSING TO ALLOW THE DEFENSE PSYCHIATRIST TO TESTIFY AS

To the contrary, the military judge allowed the expert to testify about these matters. He properly would not allow the expert to bring before the members those comments made by the appellant during his clinical interviews. The expert was allowed to testify about the basis of his conclusions, but he was not allowed to place the appellant's version of events before the members without the benefit of cross-examination of the appellant himself. The assigned error is without merit.

The appellant further contends that the military judge abused his discretion in admitting several books and catalogs concerning knives into evidence .[6\] Apparently government investigators searched through the appellant's bookshelves in an effort to find any link to the use of knives as weapons. This issue was fully litigated at an Article 39(a), UCMJ, session prior to trial on the merits. Government counsel offered the books on the theory that they provided corroboration of the appellant's admissions or confession. *See* Military Rule of Evidence. 304(g). The trial defense counsel contended that the books would be taken out of context and would prove to be more prejudicial than probative. In his view, it would not be unusual or probative of anything to find that a soldier in the United States Army possessed books or catalogs that had pictures or articles about knives and self defense. The military judge made specific findings that the items were probative and that no unfair prejudice would result to the appellant if the books were admitted into evidence. In addition, he offered the trial defense counsel the opportunity to put the books into their proper context by use of testimony and photographs. The defense presented evidence, and directed its cross-examination to highlight that the appellant merely possessed

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TO THE BASIS FOR HIS OPINION THAT, AT THE TIME OF THE OFFENSE, APPELLANT WAS IN A "RAGE".

[6\] AE VII. THE MILITARY JUDGE ABUSED HIS DISCRETION IN ALLOWING EVIDENCE THAT THE APPELLANT POSSESSED A "KNIFE BIBLE" A MILITARY SUPPLY CATALOG, AND OTHER BOOKS WHICH WERE OFFERED AS EVIDENCE OF 'PLANNING ACTIVITY," BUT WHICH WERE POSSESSED BY APPELLANT LONG BEFORE HE HAD ANY MOTIVE TO KILL ANYONE.

the books and that the government presented no proof that he relied upon them in executing his alleged crime.

We are satisfied that the military judge did not abuse his discretion regarding this issue. In addition, even if the military judge erred in allowing the materials into evidence, we hold that the appellant suffered no unfair prejudice, as we are confident that the members gave the books little weight. The members certainly recognized that many soldiers, including the appellant, possess books and catalogs that featured military equipment, including knives. We also are confident that the members recognized that many soldiers were likely to have materials about knives and guns in their personal libraries.

This murder case is unusual only in regard to the decapitation and display of the head. There was little if any dispute as to the acts involved. Our review of the record convinces us that the government carried the burden to prove premeditated murder beyond a reasonable doubt. Our review also convinces us that the alleged errors are without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge GRAVELLE and Judge ECKER concur.

FOR THE COURT:

\s\
ROBERT L. ANTHONY
Deputy Clerk of Court

APPENDIX D

If he could appreciate the wrongfulness of what he was doing, he was committing premeditated murder. Because there can be no other goal when you stab someone 15 times in the neck, saw away at their neck, like you're giving them a nooggy, and kick the head free, that you intended to kill them. We ask that you return a verdict that speaks the truth. We ask that you return a verdict of premeditated murder.

MJ: Member of the court, prior to charging you with the instructions, I think this may be a good time to take a break to give you an opportunity to grab something to eat. About how long a recess would the court desire to take at this time? It's now about 1312 hours.

PRESIDENT: About 45 minutes, Your Honor.

MJ: At this time then, the court will stand in recess until 1400 hours.

[The court recessed at 1313 hours, 1 April 1994]

[The court was called to order at 1405 hours, 1 April 1994.]

MJ: Be seated, please. The court is in session.

TC: Let the record reflect that all parties who were present when the court recessed are again present. The members are present.

MJ: Members of the court, at this time, I will instruct you on the law to be applied in this case. When you close to deliberate and vote on findings, each

of you must resolve the ultimate question of whether the accused is guilty or not guilty, based on the evidence presented here in court and on the instructions which I,11 give you. It's my duty to instruct on the law. It is your duty to determine the facts, to apply the law to these facts, and thus determine the guilt or innocence of the accused. Bear in mind again that the law presumes the accused to be innocent of the charge against him. Now, you've heard an exposition of the facts by counsel for both sides as they view them. Bear in mind that arguments of counsel are not evidence. Argument is made by counsel in order to assist you in understanding and evaluating the evidence. You must based your determination of the issues in the case on the evidence, as you remember them. Now, counsel have made reference to instructions that I will give you. And in that regard, I will merely say if there's any inconsistency between what counsel say about the instructions and the instructions I give you, you must accept my statements as being correct. Now, during the trial, some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for the record of trial, but you may use your notes to refresh your own recollection. You may find the accused guilty of an offense only if you're convinced as to guilt by legal and competent evidence beyond reasonable doubt as to each and every element of that offense.

1207 Instructions on Findings

In the specification of the charge, the accused is charged with the offense of premeditated murder. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt that: One, Specialist Gregory W. Glover is dead; Two, that his death resulted from the act of the accused in stabbing him, slitting his throat, and decapitating him with a knife, on or about 7 December 1993, at Sickels Army Airfield. Three, that the killing of Specialist Gregory W. Glover by the accused was unlawful; And, fourth, that at the time of the killing, the accused had a premeditated design to kill Specialist Gregory W. Glover; Now, you're advised that the killing of a human being is unlawful when done without legal justification or excuse. The term "premeditated design to kill" means the formation of a specific intent to kill and consideration of the act intended to bring about death. The "premeditated design to kill" does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the killing. You're advised that an issue has been raised by the evidence as to whether the accused acted in the heat of sudden passion. "Passion" means a degree of rage, pain, or fear which prevents cool reflection. If sufficient cooling off time passes between the provocation and the time of the killing which would allow a reasonable person to regain self-control and refrain from

killing, then the provocation will not reduce murder to the lesser offense of voluntary manslaughter. However, you may consider evidence of the accused's passion in determining whether he possess sufficient mental capacity to have the premeditated design to kill. An accused cannot be found guilty of premeditated murder if, at the time of the killing, his mind was so confused by anger, rage, or sudden resentment that he could not or did not premeditate. On the other hand, the fact that the accused's passion may have continued at the time of the killing does not necessarily demonstrate that he was deprived of the ability to premeditate, that he did not -- and that he did not premeditate. Thus, if you're convinced beyond reasonable doubt that sufficient cooling off time had passed between the provocation and the time of the killing which would allow a reasonable person to regain his self-control and refrain from killing, you must decide whether he in fact had the premeditated design to kill. If you're not convinced beyond reasonable doubt that the accused killed with premeditation, you may still find him guilty of unpremeditated murder if you're convinced beyond reasonable doubt that the death of Specialist Gregory W. Glover was caused, without justification or excuse, by an act of the accused, and the accused intended to kill or inflict great bodily harm on the victim. The court is further advised that the offense of

unpremeditated murder is a lesser included offense of the offense set forth in the specification of the charge. When you vote, if you find the accused not guilty of the offense charged -- that is, premeditated murder -- you should then consider the lesser included offense of unpremeditated murder, also a violation of Article 118 of the Uniform, Code of Military Justice. In order to find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond reasonable doubt 9 as follows: One, that Specialist Gregory W. Glover is dead; Two, that his dead resulted from the acts of the accused in stabbing him, slitting his throat, and decapitating him with a knife, on or about 7 December 1993, at Sickels Army Airfield; Three, that the killing of Specialist Gregory W. Glover by the accused was unlawful; And, fourth, that at the time of the killing, the accused had an intent to kill or inflict great bodily harm upon Specialist Gregory W. Glover. And, again, you're advised the killing of a human being is unlawful when done without legal justification or excuse. The intent to kill or inflict great bodily harm may be proved by circumstantial evidence, that is, by facts or circumstances from which you may reasonably infer the existence of such an intent. Thus, it may be inferred that a person intents the natural and probable results of an act he purposely does.

1210 Instructions an Findings

Therefore, if a person does an intentional act which is likely to result in death or great bodily harm, it may be inferred that he intended to inflict death or great bodily harm. The drawing of this inference, however, is not required. Now, the term "great bodily harm" means serious bodily injury. Great bodily harm does not mean minor injury, such as a black eye or bloody nose, but does mean, for example, fracture or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injury. You're advised that the lesser offense of voluntary manslaughter in included within the crime of unpremeditated murder. Voluntary manslaughter is the unlawful killing of a human being with an intent to kill or inflict great bodily harm, done in the heat of sudden passion caused by adequate provocation. Acts of the accused which might otherwise amount to murder constitute only the lesser offense of voluntary manslaughter, if those acts were done in the heat of sudden passion caused by adequate provocation. Passion means a degree of anger, rage, pain, or fear which prevents cool reflection. The law recognizes that a person may be provoked to such an extent that in the heat of sudden passion, caused by adequate provocation, he strikes a fatal blow before he has had time to control himself. A person who kills because of passion caused by adequate provocation is not guilty of murder. Provocation is adequate if it would cause uncontrollable passion in the mind of a reasonable person. The provocation must

not be sought or induced as a excuse for killing or doing harm. If you're not satisfied beyond reasonable doubt that the accused is guilty of murder, but you are satisfied beyond reasonable doubt that the killing, although done in the heat of sudden passion caused by adequate provocation, was done with the intent to kill or inflict great bodily harm, you may still find the accused guilty of voluntary manslaughter. Now, you're advised that the intent to kill or inflict great bodily harm does not have to exist for any measurable or particular time before the act which causes the death. All that is required is that it exist at the time of the act which caused the death. Now, the offense charged in the specification of the charge, premeditated murder, differs from this lesser included offense of unpremeditated murder, in that the offense charged requires as an essential element that you be convinced beyond reasonable doubt that at the time of the killing, the accused had a premeditated design to kill Specialist Gregory W. Glover. Whereas the lesser offense of unpremeditated murder does not include such an element, but requires instead that at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon Specialist Gregory W. Glover. In other words, the lesser included offense contains the first three elements as the offense charges, but differs in that last element as I've just set forth for you.

Now, you're advised that another and final lesser included offense of the offense alleged in the specification of the charge is the offense of voluntary manslaughter, in violation of Article 119 of the Uniform Code of Military Justice. In order to find the accused guilty of this lesser offense, you must be convinced by legal competent evidence beyond a reasonable as follows: One, that Specialist Gregory W. Glover is dead; Two, that his death resulted from the acts of the accused in stabbing him, slitting his throat, and decapitating him with the knife, on or about 7 December 1993, at Sickels Army Airfield; Three, that the killing of Specialist Gregory W. Glover by the accused was unlawful; And, fourth, that at the time of the killing, the accused had an intent to kill or inflict great bodily harm upon Specialist Gregory W. Glover. Again, you're reminded that the killing of a human being is unlawful when done without legal justification or excuse. The offense of voluntary manslaughter is committed when a person, with the intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation. The term "passion" again, means anger, rage, pain, or fear. Proof that the accused was acting in the heat of passion caused by adequate provocation is not required. It is essential,

however, that the four elements that I've listed for you be proven beyond reasonable doubt before the accused can be convicted of voluntary manslaughter. Now, this lesser included offense differs from the lesser included offense I discussed with you previously -- that is, the offense of unpremeditated murder -- in that the offense of voluntary manslaughter, although requiring the same essential elements is reduced to the lesser included offense of voluntary manslaughter, if it was done in the heat of sudden passion caused by adequate provocation without time for cool reflection, as I've previously defined that for you. Now, the evidence in this case has raised an issue whether the accused had a mental condition and required state of mind with the respect to the offense of premeditated murder and it's lesser included offenses. In determining this issue, you must consider all relevant facts and circumstances. Now, one of the elements of this offense -- of these offenses is a requirement of premeditation and a specific intent to kill as to the charged offense, and the intent to kill or inflict great bodily as to the lesser included offenses, on which you've already been instructed. Now, you're advised an accused because of some underlying mental condition may be mentally incapable of entertaining the premeditated design to kill, or the specific intent to kill, or the specific intent to kill or inflict great bodily harm. You

should therefore consider, in connection with all the relevant facts and circumstances, evidence tending to show the accused may have been suffering from a mental condition of such consequence and degree as to deprive him of the ability to entertain the premeditated design to kill, or the specific intent to kill, or the specific intent to kill or inflict great bodily harm. The guilt of the accused is on the government to establish the guilt of the accused by legal and competent evidence beyond reasonable doubt; unless in light of all the evidence, you're satisfied beyond reasonable doubt that the accused, at the time of the alleged offense, was mentally capable of entertaining the premeditated design to kill, or the specific intent to kill, or the specific intent to kill or inflict great bodily harm; you must find the accused not guilty of those offenses. Now, this evidence was not offered to demonstrate or refute whether the accused is mentally responsible for his conduct. Lack of mentally responsibility -- that is, heat of passion defense -- is not an issue in this case. What is an issue in this case is whether the government has proved beyond reasonable doubt that the accused had the ability to entertain the premeditated design to kill, or the specific intent to kill, or the specific intent to kill or inflict great bodily harm. In considering this issue, you may consider the evidence of the accused's mental condition before and after the alleged offense, as well as the evidence as to the accused's mental

condition on the date of the alleged offense. The evidence as to the accused's mental condition before and after that date is admitted for the purpose of assisting you to determine the accused's condition on the date of the alleged offense. Now, you heard the evidence of Doctor Reynolds and Doctor Diebold, forensic psychiatrists, who testified as "expert witnesses." And expert in a particular field is permitted to give his opinion in evidence. In this connection, you're instructed that you're not bound by medical labels, definitions, or conclusions. Whether the accused had a mental condition and the effect, if any, that condition had on the accused must be determined by you. Now, there was also testimony of lay witnesses, with respect to their observations of the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations, and other facts known to them, and may express an opinion based upon those observations and facts known to them. In weighing the testimony of such lay witnesses, you may consider the circumstances of each witnesses -- of each witness, their opportunity to observe the accused, and to know the facts to which the witness has testified, their willingness and capacity to expound freely as to their observation and knowledge, the basis for the witness, opinion and conclusions, and the time of their observations in relation to the time of the commission of the offense charged. You may also consider whether the witness observed extraordinary or bizarre acts performed by

the accused, or whether the witness observed the accused's conduct to be free of such conduct or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness' observation of the accused and the nature and length of time of the witness' contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a main condition, and that the failure of the lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused. You're not bound by the opinion of either lay or expert witnesses. You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight as you believe it is fairly entitled to receive. Now, evidence may be direct or circumstantial. Direct evidence is evidence which tends directly to prove or disapprove a fact in issue. Circumstantial evidence is evidence which tends directly to prove not a fact in issue, but some other fact or circumstance from which either alone, or together with some other facts and circumstances, you may reasonably infer the existence or nonexistence of a fact in issue. There's no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the

weight and value you believe it deserves. Now, I've instructed you that for the offense of premeditated murder, the accused must have had a specific intent to kill Specialist Gregory W. Glover, and for the lesser included offenses, must have had a specific intent to kill or inflict great bodily harm upon Specialist Gregory W. Glover. Specific intent must be proven beyond reasonable doubt. Direct evidence of intent is often unavailable. The accused's intent, however, may be proven by circumstantial evidence. In deciding this issue, you must consider all relevant facts and circumstances. Now, the testimony of Frau Herbert and Frau Larbig, who are unavailable, have now been read to you. Their testimony, by way of deposition, may be attacked, contradicted, or explained in the same way of all other live testimony. You may consider, along with all the factors affecting believability, that you have not the opportunity to observe the appearance of these witnesses while testifying. The deposition itself, since it is the testimony of witnesses, will not be given to you as an exhibit. However, if you want to have any of the deposition testimony reread to you, you may ask for it in open court. Now, the parties have stipulated or agreed what the testimony of Lieutenant Colonel Noyes and Chaplain (Major) Penland would be if they were present in court and testifying under oath. These stipulations do not admit the truth of such testimony which may be attacked, contradicted, or explained in the same way as any

other testimony. You may consider, along with all other factors affecting believability, the fact that you have not had an opportunity to personally observe these witnesses. Now, the parties to this trial have stipulated or agreed that the decedent is Specialist Gregory W. Glover. When counsel for both sides, with the consent of the accused, stipulate and agree to a fact, the parties are bound by the stipulation, and the stipulated matters are facts in evidence to be considered by you along with all other evidence in the case. Now, to show the probability. of his innocence, the defense has produced evidence of the accused's good military record and character for peacefulness. Evidence of the accused's character for these traits maybe sufficient to cause reasonable doubt as to his guilt. on the other hand, evidence as to the accused's good character for these traits may be outweighed by other evidence tending to show the accused's guilt. Now, the evidence has also raised an issue as to whether a pretrial statement was in fact made by the accused. You must consider all relevant facts and circumstances. And I'm referring to the testimony of Mr. Frank that the accused asked him to point out where Specialist Glover was, and made to statement to the effect that, "He must have got the message" ---

CDC: Your Honor, with all due respect, Mr. Frank never said the accused did that.

MJ: I'm sorry. You're correct. The testimony was whether

Mr. Frank said that an individual asked him to point out where Specialist Glover was and that, "He must have got the message." You must decide in your deliberations on the findings of guilt or innocence whether, and to what extent, the evidence on behalf of either side should be believed. You may only consider that statement as evidence if you're convinced beyond reasonable doubt that it was in fact made by that person; otherwise, you must disregard it and give it no consideration, whatsoever. The accused has the absolute right to remain silent. You will not draw any inference adverse to the accused from the act that he did not testify as a witness. The fact that the accused has not testified must be disregarded by you. Now, you have the duty to determine the believability of the witnesses. In performing this duty, you must consider each witness intelligence, ability to observe and accurately remember, and their sincerity and conduct in court. Consider also the extent to which each witness is either supported or contracted by other evidence, the relationship each witness may have with either side, and how each witness might be affected by the verdict. When weighing discrepancy by a witness, or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate falsehood. Taking all these matters into account, you should then consider the probability of each witness, testimony, and the inclination of that witness to tell the truth. The believability of each witness' testimony should be your guide in

evaluating testimony, and not the number of witnesses called. Now, you've heard the testimony of Special Agent McDowell on forensic serology, Doctor Sandberg on pathology, Doctor Cogswell on forensic pathology, and Doctors Reynolds and Diebold on forensic psychiatry. They are known as expert witnesses because their knowledge, skill, experience, training, or education may assist you in understanding the evidence or in determining a fact in issue. You're not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness. You should, however, consider their qualification as experts. Now, when an expert answers an hypothetical question, the expert assumes as true every asserted fact stated in the question. Therefore, unless you find that the evidence establishes the truth of the asserted facts in the hypothetical question, you cannot consider the answer of the expert witness to that hypothetical question. Now, you heard evidence that certain witnesses made statements prior to trial that may be inconsistent with his or her testimony at this trial. If you believe that an inconsistent statement was made, you may consider the inconsistency in evaluating the believability of the testimony of those witnesses. You may not, however, consider the prior statement as evidence of the truth of the matters contained in the prior statements. You're further advised, first, that the accused is

presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt. Second, if there's reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and he must be acquitted. Third, if there's reasonable doubt as to the degree of guilt, that doubt must be resolved in favor of the lowest degree of guilt as to which there is no reasonable doubt. And, lastly, the burden of proof to establish the guilt of the accused beyond reasonable doubt is on the government. The burden never shifts to the accused to establish innocence, or to disprove the facts necessary to establish each element of the offense. Now, by "reasonable doubt" is intended not a fanciful or ingenious doubt or conjecture, but an honest conscientious doubt suggested by the material evidence or lack of it in a case. It is an honest misgiving caused by insufficiency of proof of guilt. "Proof beyond reasonable doubt" means proof to a moral certainty, although not necessarily to an absolute or mathematical certainty. A "reasonable doubt" is a doubt which would cause a reasonable prudent person to hesitate to act in important and weighty personal affairs. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although

these particular facts advanced by the prosecution which does not amount to an element, need not be established beyond reasonable doubt. However, if on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty. You should bear in mind that only matters properly before the court, as a whole, should be considered. In weighing and evaluating the evidence, you're expected to utilize your common sense, you knowledge of human nature, And the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind that you may properly believe one witness and disbelieve several other witnesses whose testimony is in conflict with that of the one. The final determination, as to weight or significance of the evidence and the credibility of the witnesses in this case, rests solely upon you members of the court. You must disregard any comment or statement made by me during the course of the trial that might to indicate an opinion on my part as to whether the accused is guilty or not guilty, since you, and you alone, have the responsibility to make that determination. As court members, each of you must impartially resolve the ultimate issue in accordance with the law given you, the evidence admitted in court, and your own conscience. Now, the following procedural rule will apply to your deliberation and must be observed. The influence of superiority

in rank will not be employed in any manner in an attempt to control the independence of other members in the exercise of their own personal judgement. The deliberation should properly include a full and free discussion of all the evidence that has been presented. After you've completed your discussion, then voting on your findings must be accomplished by secret written ballot, and all members of the court are required to vote. You vote on the specification under the charge before you vote on the charge. If you find the accused guilty of the specification under the charge, then the finding as to the charge is also guilty. The junior member collects and counts the votes. The count is then checked by the president who immediately announces the results of the ballot to the members. The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding of guilty. Since we have seven members, that means five members must concur in any finding of guilty. If a finding of not guilty is made, vote next on the lesser included offenses in order of decreasing severity. If a finding of guilty is made, you've convicted the accused of that lesser included offense. If you've voted on all the lesser included offenses and a finding of not guilty is made as to all lesser included offenses, you've acquitted the accused of the specification and its lesser included offenses.

1224 Instructions on Findings

If you have five votes of guilty with regard to any offense that will result in a finding of guilty for that offense. If fewer than five members vote for a finding of guilty, then your ballot has resulted in a finding of not guilty, bearing in mind the instructions I just gave you on voting on the lesser included offenses. If you have doubt about the manner in which the injury described in the specification were inflicted, but you're satisfied beyond a reasonable doubt that the offense, or a lesser included offense, was committed in a particular manner which differs slightly from the exact manner in the specification, you may make minor modification and reaching your finding by changing the manner in which the alleged injuries described in the specification were inflicted, provided you do not change the nature, or identity of the offense, or the lesser included offense. That is, you may still reach a finding of guilty, so long as all the elements of the offense, or the lesser included offense, are proved beyond a reasonable doubt; but you must modify the specification to correctly reflect your findings. You may reconsider any finding prior to its being announced in open court, and you may reconsider any finding of guilty prior to a sentence being announced. However, after you vote, if any member expresses a desire any finding, open the court and I will give you further specific instructions on how to go about doing that. If that should occur, when the court has

assembled, the president will not announce the findings reached, but will only announce that reconsideration of a finding has been proposed. Do not state whether the finding proposed or reconsidered is a finding of guilty or not guilty, or which level of offense is involved. As soon as the court has reached its findings, and I have examined the findings worksheet, the findings will be announced by the president in the presence of all parties. The format is set out for you in the sentence worksheet. As an aid of putting your findings in proper form, you may used Appellate Exhibit Number XL, which I'll now have the trial counsel hand to the president of the court.

TC: Your Honor, I'm handing the Colonel the worksheet which has been marked as Appellate Exhibit XL.

MJ: As indicated, the first portion will be used if the accused is completely acquitted of the charge and specification, or the accused is convicted as charged of the charge and specification. The second part will be used if the accused is convicted of the lesser included offense of unpremeditated murder. And the third part will be used if the accused is convicted of the lesser included offense of voluntary manslaughter. Once you have reached a finding, if you would simply circle the one that is applicable and cross out the rest that is inapplicable, that usually assists the president of the court in

properly announcing the findings of the court. Now, you'll note that the findings worksheet has been modified to reflect the words that we deleted, as well as the words that we substituted therefor, if you find the accused guilty of a lesser included offense. These modifications on the worksheet in no way indicates an opinion by myself, or either counsel, concerning any degree of guilt of this accused. They're merely included to aid you in understanding what findings might be made in the case, and for no other purpose whatsoever. The worksheet is provided only as an aid in finalizing your decision. If during the close session, you have any questions about the findings worksheet, or any other matter, open the court and I will assist you in that matter. The Uniform Code of Military Justice prohibits me or anyone else from entering your closed session deliberations. You may not consult or consider the Manual for Courts-Martial, or any other legal publication or writing. All the members must remain together throughout the closed session deliberation, and you must permit no unauthorized intrusion into the secrecy of your deliberations. Now, if it is necessary for any administrative reasons, your deliberation may be interrupted by a recess. However, you must come in, formally recess, reassemble at the end of the recess, account for all the parties, and then formally close again for your deliberations; and this is a vital legal requirement.

1227 Instructions on Findings

But, first, I'll ask does any member of the court have any questions concerning any of the instructions?

MEMBERS: [Indicated a negative response.]

MJ: Apparently not. Does counsel for either side have any objection to the instructions as given, or any request for additional instructions?

TC: No, Your Honor.

CDC: No, Your Honor.

MJ: Then prior to the members closing, let me just ask of the trial counsel, do you know the key to. the door of the deliberation room, do we know where that is? I want to give it to the members, so that they can lock that door from the inside.

TC: No, sir. But I will ascertain where it is and have it delivered by the door to the panel members.

MJ: The last time we locked them in from the outside, and when it was all over they couldn't get out. At this time also, I need -- Sergeant Smith, if you could come over here [to bailiff].

BAILIFF: [Complies.]

MJ: And the assistance of someone else, maybe Captain Maxwell, who's standing up; or someone over there can assist. This table that's in front of me, if you'd take the microphone off of it, all the admitted evidence is on this table, so I'm just going to have -- I know it would be easier to just pick up the whole table and bring it in there.

APPENDIX E

DEPARTMENT OF THE ARMY PAMPHLET 27-9

MILITARY JUDGE'S BENCHBOOK

Paragraph 1-2 Necessity for Tailoring.

No standardized set of instructions can cover every situation arising in a trial by court-martial. Special circumstances will invariably be presented, requiring instructions not dealt with in this benchbook, or adaptation of one or more of these instructions to the facts of a case. These instructions are not intended to be a substitute for the ingenuity, resourcefulness and research skill of the military judge. They will be of maximum value when used as a guide to carefully tailored instructions to be given to court members. The tailoring of instructions to the particular facts of a case contemplates the affirmative submission of the respective theories, both of the Government and of the accused, to the members of courts, with lucid guideposts, to the end that they may knowledgeably apply the law to the facts as they find them.

APPENDIX F

Rule for Courts-Martial 920 INSTRUCTIONS ON FINDINGS

(a) In general. The military judge shall give the members appropriate instructions on findings.

(b) When given. Instructions on findings shall be given before or after arguments by counsel, or at both times, and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.

(c) Requests for instructions. At the close of the evidence or at such other time as the military judge shall permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.

(d) How given. Instructions on findings shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.

(e) Required instructions. Instructions on findings shall include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

(2) A description of the elements of each lesser included offense in issue, unless trial of a lesser included offense is barred by the statute of limitations...and the accused refuses to waive the bar;

(3) A description of any special defense under R.C.M. 916 in issue;

(4) A direction that only matters properly before the court-martial may be considered;

(5) A charge that---

(A) The accused must be presumed to be innocent until the accused's guilt is established be legal and competent evidence beyond reasonable doubt;

(B) In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

(C) If, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the findings must be in a lower degree as to which there is not reasonable doubt; and

(D) The burden of proof to establish the guilt of the accused is upon the Government...

(6) Directions on the procedures under R.C.M. 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given.